

1 UNITED STATES DISTRICT COURT  
2 MIDDLE DISTRICT OF GEORGIA  
3 ALBANY DIVISION

4 CASE NO. 1:07-CR-18(WLS)

5  
6 UNITED STATES OF AMERICA

7 Plaintiff,

8 Vs.

9 FRANK RUSSELL McCOY

10 Defendant.

11  
12 PRETRIAL CONFERENCE

13 BEFORE THE HONORABLE W. LOUIS SANDS  
14 UNITED STATES DISTRICT COURT JUDGE

15  
16 DATE: DECEMBER 9, 2009

17 LOCATION: ALBANY, GEORGIA

18 COURT REPORTER: R. DARLENE PINO

19  
20 APPEARANCES:

21 FOR THE PLAINTIFF: JAMES N. CRANE

22 FOR THE DEFENDANT: CYNTHIA ROSEBERRY  
23 MORAD FAKHIMI

1 (Defendant present)

2 THE COURT: All right. Good afternoon.

3 COUNSEL COLLECTIVELY: Good afternoon, Your  
4 Honor.

5 THE COURT: First, we'll call the criminal  
6 calendar. I think I'm aware of most updates to the  
7 calendar, but there may be one or two that I am not aware  
8 of. If that's not the case, please, advise the Court.

9 First case is case number 1:07-CR-18-1, United States  
10 vs. Frank Russell McCoy. Mr. Crane for the government and  
11 Ms. Leek for the defendant.

12 MS. ROSEBERRY: Your Honor, I'm Cynthia  
13 Roseberry here for the defendant as well along with Mr.  
14 Morad Fakhimi from our office.

15 THE COURT: All right. Now, the Court shows  
16 there are a number of motions dismissed and related  
17 motions that have been filed that the Court will issue a  
18 written order. Those motions will be denied, and the  
19 Court will give a written order in the next several days.  
20 It is rather voluminous, fully explaining its decision,  
21 but I thought in fairness to counsel, you should know  
22 that. So are there other matters? What is the  
23 government's announcement in light of that?

24 MR. CRANE: Just to make sure I heard correctly.  
25 All the motions pending --

1 THE COURT: The motions to dismiss.

2 MR. CRANE: The dispositive motions?

3 THE COURT: Yes. Dispositive, yes.

4 MR. CRANE: There is still the issue of whether  
5 the 404(b) evidence -- whether the child pornography found  
6 only in Minnesota can come in. But we understand the  
7 Court will be issuing its ruling.

8 THE COURT: Is that -- I don't know -- Of  
9 course, it's been some time ago that we had the hearing on  
10 the main motions in the case. Is there a -- is that  
11 something we need to be heard -- there needs to be a  
12 hearing on? I know sometimes there's a notice from the  
13 government and objection from the defendant, but sometimes  
14 it requires some kind of showing before the Court can give  
15 an actual ruling.

16 MR. CRANE: Your Honor, I believe we can proffer  
17 the evidence if the Court requires. I believe -- Though  
18 it is really, basically an issue of law. This is the  
19 issue that the 404(b) evidence goes to address. Is the  
20 defendant's intent in distributing the text solely to  
21 engage in constitutionally protected speech under the  
22 First Amendment? The government argues it is not because  
23 the text which he distributed, the rape, incest, and  
24 murder of minor children, is exactly what he had pictures  
25 of except the actual murder, excuse me. But abundant

1 pictures of actionable and criminal child pornography on  
2 his computer. Therefore, we argue that he does not have a  
3 good faith basis for the argument that his intent all  
4 along was only to engage in protected speech, because he  
5 --

6 Yes, sir.

7 THE COURT: I was about to say something. What  
8 I am going to do, because the motions to dismiss were in  
9 great detail, with a lot of sub-issues, so I've really,  
10 frankly, not looked back at that one now that you have  
11 brought it back to my attention. What I will do, I'll  
12 look further at that since we are roughly almost a month  
13 out from the actual trial term. What I'll do if I feel it  
14 is necessary, I'll notify counsel for a further hearing on  
15 that and hear from you all further if it needs to be.

16 MR. CRANE: Right.

17 Finally, Your Honor, I note that the trial term in  
18 January begins on the 4th. Both the defense -- the  
19 defendant comes from out of state as do witnesses for the  
20 government, from Minnesota and Washington, D.C, as well as  
21 Internet service providers from California and elsewhere.  
22 The Court will note that the 4th is a Monday. January 1st  
23 is a very -- comes on a Friday, and it is very difficult  
24 for us to work with lay witnesses, meaning that both the  
25 defendant --

1 THE COURT: What reason would that be?

2 MR. CRANE: On the 1st of January.

3 THE COURT: I am not being serious, Mr. Crane.

4 Go ahead.

5 MR. CRANE: Yes.

6 (Laughter)

7 THE COURT: The Court will take judicial notice  
8 of that.

9 MR. CRANE: If the Court could perhaps protect  
10 the government and the defense, if they choose to join in,  
11 until the 11th, it would be greatly in the interest of all  
12 the parties.

13 THE COURT: One other question I had, too,  
14 before you sit down. I thought the case would need some  
15 special consideration. How long do you all, at this time,  
16 estimate that case to take to try?

17 MR. CRANE: Your Honor, most of it, I believe,  
18 was front-loaded with dispositive constitutional issues,  
19 matter of law. We expect to have six witnesses, of which  
20 three are Internet service provider custodians of record,  
21 who simply will testify that their records show that Frank  
22 McCoy's home page contained this text and it was  
23 distributed through their computer server in interstate  
24 commerce. That brings us down to about three really fact  
25 witnesses, and then one of those would also testify to the

1 404(b) evidence. So basically, three short witnesses  
2 should not be on the stand with the government for more  
3 than ten minutes each, and then three witnesses. I would  
4 expect the government could put on most of its evidence in  
5 a day.

6 THE COURT: All right. Ms. Roseberry.

7 MS. ROSEBERRY: Based on the representations of  
8 the government, Your Honor, it probably wouldn't take any  
9 more than two days then. Of course, we still have not  
10 made the decision about our client testifying and  
11 witnesses, et cetera. But we don't expect anything longer  
12 than that. There are some other pretrial issues though  
13 that need to be decided. I think there's a suppression  
14 issue on a search motion that Mr. Fakhimi filed.

15 THE COURT: All right. Okay. I'm aware of that  
16 one.

17 MS. ROSEBERRY: And we are not opposed to the  
18 January 11th week date proposed by the government. Of  
19 course, you know, I have inherited Mr. Gerard's calendar,  
20 so a number of things will conflict with that, but that's  
21 always the case.

22 THE COURT: In light of you all suggesting that  
23 it will take a couple days to try it, I'll usually stretch  
24 it to about three on the safe side. That still makes it a  
25 moderately short case and that gives us more flexibility.

1 I'll take to that first week but be more specific about  
2 when the case will start once I have heard what is ready  
3 and the entire calendar.

4 MS. ROSEBERRY: Okay. And, Your Honor, as a  
5 caveat, I have been accused of being loquacious, so that  
6 would exclude opening and closing.

7 THE COURT: That's why I put that one day buffer  
8 in there.

9 All right. So except for matters that are pending  
10 that the Court needs to address that might affect the  
11 case, the case is marked ready for the week beginning and  
12 not before January 11th.

13 (Hearing concluded)

14

**CERTIFICATE**

15

16 I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE  
17 TRANSCRIPT OF THE PROCEEDINGS.

18

19

/s/\_\_\_\_\_  
R. DARLENE PINO  
UNITED STATES COURT REPORTER  
Certified Shorthand Reporter (Fl)  
CB King Federal Courthouse  
201 West Broad Avenue  
Albany, Georgia 31701  
Phone: (229) 343-7550

NOVEMBER 15, 2013

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**R. Darlene Pino  
United States Court Reporter  
(229) 343-7550**